WORKMEN'S COMPENSATION ACTS:

THEIR THEORY AND THEIR CONSTITUTIONALITY.

OF late there has arisen a new answer to the old question: When a workman in the course of his employment, and because of it, is killed or merely disabled, who should bear the financial loss? Obviously the physical burden must be borne by the workman himself, however much it may be reduced by hospitals and the like; but what shall be said of that part of the burden which is easily capable of translation into dollars and cents — including the financial equivalent of lost time?

The question has been active for about seventy-five years. For the first sixty years there was heard in countries using the Anglo-American system of law practically only one answer, — one based on decisions.[1] But now for about fifteen years these countries have been giving occasionally a new answer, — one embodied in statutes which have had their origin on the continent of Europe.

The old answer depended much upon ascertaining who was at fault. If the employer were at fault, he might be responsible; and so too in case the employer, though not personally to blame, had delegated to someone a duty which is really incapable of delegation, — for example, the duty of seeing that a competent person uses proper diligence in supplying reasonably safe appliances, — and the person to whom he delegated this duty actually neglected it and thus caused the casualty. Yet even in these cases of actual or imputed negligence the employer might escape, for he would not be responsible if the injured workman assumed the unnecessary risk voluntarily, nor if the result was wholly or partly caused by that injured workman's own negligence. When there was no actual or imputed negligence of the employer, the burden necessarily fell upon the injured man, for the casualty must then be a mere accident foreign to the employment, or a mere incident of the employment and hence contemplated and assumed by the work-

[1] See Priestley *v.* Fowler, 3 M. & W. 1 (1837); Murray *v.* South Carolina R. Co., 1 McMul. (S. C.) 385 (1841); Farwell *v.* Boston & Worcester R. Corporation, 4 Met. (Mass.) 49 (1842).

man, or a result, at least partly, of the workman's own negligence. The old answer, then, laying stress upon the assumption of both the ordinary risks of the employment and the known extraordinary risks, and also upon contributory negligence, was, and, unless changed by statute, still is, that when the casualty is due to an ordinary or a known risk, — for example, the negligence of a fellow-servant, — or wholly or partly to the negligence of the person injured, then the financial burden rests wholly upon the workman and upon those dependent upon him.

The new answer, on the other hand, knows nothing of distinctions based upon the employer's obliquity, nothing of the assumption of risk, — including the fellow-servant rule, — and very little as to the negligence of the injured man himself. The new answer is, in short, that there is to be indemnity in every case where the casualty is incident to the employment, unless, indeed, the casualty is brought to pass by the injured man's wilfulness.

The economic basis of the old answer includes a theory that the workman receives a compensation which takes into account the dangers of the employment, and that thus the amount of the risk passes into the price of the things made by the employer, so that this burden is borne eventually by the customer and not by the workman.

The new answer, on the other hand, is based upon a belief that the old economic theory is at variance with facts, that the workman even in very dangerous employments — like mining — does not receive extraordinary compensation, that the amount of the risk does not appear in the price of the articles produced, and that the burden of a casualty if placed primarily on the workman is borne by his dependents or by charitable neighbors or by public charities, and is eventually in one way or another thrust indirectly upon the public, — the general public, not the public peculiarly benefited as consumers or the like by the production of the goods representing among other things the work of the person injured or imperilled.

Thus there has arisen the new answer, to the effect that the pecuniary burden should be borne not even primarily by the workman; that casualties are an essential feature of industrial undertakings, necessarily recognized as such by both workmen and employers; that this is true even of the negligence of fellow-ser-

vants and of the workman himself; that the workman, especially in large undertakings, does not have it in his power to modify the conditions of his service; that the effective force in creating and managing the employment is the employer; that the work is undertaken primarily in the interest of the employer and ultimately in the interest of the public; that the employer can easily transfer to the customer the necessary pecuniary equivalent of any risk; that, whatever the primary method of placing the burden, the loss, whether by death or by disablement, will be borne eventually not by the workman but by society; and that the workman's injury should be relieved without the intervention of charity and on the contrary with a recognition of this relief as a right equivalent to a soldier's right to a pension.

The new answer is the one underlying workmen's compensation acts. The acts, it is true, contain many diversities in detail. The most important diversity is that in some countries, including Germany[2] and Austria, the compensation of the injured workman is paid through an insurance scheme to which both workmen and employers contribute, whereas in most countries, including England and France, the compensation is paid directly by the employer, — the economic theory in either case being that through enhanced price the burden passes eventually to that part of the public which is peculiarly benefited.

As has been said, the foundation of workmen's compensation acts is the new answer as to the proper initial incidence of the pecuniary burden resulting from injury. Yet it would be a mistake to think that the mere destruction of the old answer is enough to create a workmen's compensation act. No, there is another element, and one so important that it is what has given rise to the title by which the acts are known; and this is the displacing of the old rather blind verdict of a jury as to the pecuniary amount of the damage, and the substitution of a definite sum to be determined by the unfortunate workman's wages and hence with greater accuracy to be termed compensation. There is still another element, though one not absolutely essential; and this is the creation

[2] The insurance feature of the German statute is far from being its most important point; but it has naturally been emphasized by laymen discussing the statute, and thus the attention of American lawyers was not immediately directed to the bearing of this statute upon questions as to assumption of risk and contributory negligence.

of a simple procedure, whereby the recovery may be prompt, cheap, and non-litigious.

To repeat, then, the essential features of a workmen's compensation act are that in case of injury to a workman in the course of his employment there is indemnity dependent upon the amount of his wages and independent of considerations as to contributory negligence — save in extreme cases — and as to assumption of risk. The diversities in form do not disguise the truth that underlying each workmen's compensation act is the same matter of substance, — the disappearance of assumption of risk and the minimizing of contributory negligence. Back of all this is the one theory, — the new and already almost world-wide theory that industrial risks should be perceived by society to be inseparable accompaniments and expenses of industrial enterprises.

It was in Germany, in 1884, that the first workmen's compensation act was adopted, and now this new body of doctrine has swept over almost the whole of Europe and of the British colonies, a total of more than two dozen jurisdictions,[3] and has entered upon a legislative career in the United States, already resulting in about half as many state statutes.[4]

[3] According to Bulletin No. 90 (September, 1910) of the United States Bureau of Labor, pp. 723–748, the workmen's compensation acts outside the United States, together with the dates of first enactment, are: Germany (1884); Austria (1887); Norway (1894); Finland (1895); Great Britain (1897); Denmark (1898); Italy (1898); France (1898); Spain (1900); New Zealand (1900); South Australia (1900); New South Wales (1901); Netherlands (1901); Greece (1901); Sweden (1901); Western Australia (1902); Luxembourg (1902); British Columbia (1902); Russia (1903); Belgium (1903); Cape of Good Hope (1905); Queensland (1905); Hungary (1907); Transvaal (1907); Alberta (1908); Quebec (1909). The statutes in force in those twenty-six jurisdictions in 1909 are summarized in the same place.

[4] The workmen's compensation acts in the United States have been: New York in 1910; and, in 1911, ten states or more, Washington and Kansas adopting statutes on the same day, then Nevada, New Jersey, California, New Hampshire, Wisconsin, Illinois, Ohio, and Massachusetts. Session laws of many states are not yet accessible.

The United States and several of the states have appointed commissions to study the subject.

It is to some extent a question of opinion whether certain statutes should be classed as workmen's compensation acts. Some of the legislative provisions showing a gradual approach toward the workmen's compensation acts of the present day must now be noticed.

More than fifty years ago, statutes modifying the fellow-servant rule began to be adopted. Such statutes sometimes have applied to railways only. See Ga. Acts of 1855–56, p. 155. Others, following closely the provisions of the British Employers' Liability Act of 1880, have had a wider application. Further, in 1901 Colorado abol-

And how about constitutionality?

In the absence of prohibitions in the state and federal constitutions, the legislative powers of state legislatures have no limit.

The only provision in the Constitution of the United States which can be used as the basis of an attack upon the state statutes in question is the Fourteenth Amendment: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The meaning of these phrases is not as clear as one could wish; but for the present purpose the indefiniteness of meaning causes no difficulty, for it must be agreed that under the authorities the employer is deprived of life, liberty, or property by being compelled to assume this new liability as an incident of carrying on his business, and that the deprivation is fatal in case it can be fairly termed novel and unreasonable.

Persons who argue that the new liability is novel and unreasonable say truly that workmen's compensation acts place upon the employer a burden, at least in a preliminary way, for an accident which may be wholly inevitable. It is then alleged that it is con-

ished the fellow-servant rule entirely. See Colo. Sess. Laws, 1901, c. 67. Yet these statutes contained no provisions as to measuring compensation, and hence they cannot be counted as workmen's compensation acts.

In 1902 payment through compulsory coöperative insurance was provided by Maryland in two statutes applicable to a few employments. One of these statutes was overthrown because of its improper delegation of judicial functions. Another statute with restricted application was adopted in 1910. In these statutes, indemnity was not determined by wages; and thus there is a diversity from workmen's compensation acts in the strict sense. See Md. Laws of 1902, cc. 139 and 412, and Md. Laws of 1910, c. 153.

In 1905 the Philippine Commission enacted that employees of the Insular Government, including laborers, who were injured in the clear line of duty, might continue to receive their regular compensation for ninety days, in the discretion of two designated officials. See Act No. 1416, § 6, in 5 Public Laws Enacted by Philippine Comm. 103, 158. This provision was contained in an annual appropriation bill, and it permitted payments out of the appropriation for that year. It was repeated in other annual appropriation bills. It was not equivalent to a workmen's compensation act, for it gave no absolute right, and, besides, it was simply a provision as to the employees of the enacting power, — in short it was much like the gifts which any employer makes to his workmen. Further, the United States statute of 1908, applicable to artisans and laborers employed by the United States, cannot be called a workmen's compensation act, partly for the reason that it applies only to employees of the enacting power, and partly because it excludes injuries due to the negligence or misconduct of the employee. See 35 U. S. Stats. at Large 556.

trary to the spirit of our system of law to place legal responsibility upon a person who is without negligence or other fault.

This allegation is wholly unsound. Trover, trespass, slander, and libel are ancient parts of our law; and moral obliquity is no part of any one of them. To come closer to the very sort of liability, an employer, however innocent, may be liable for the wrongs committed by his servant upon a stranger. To come still closer, the employer, however innocent, is liable to his employee for injuries to that employee by reason of the failure of another employee to use due diligence in furnishing appropriate appliances and the like. It would be easy to give a long list of civil liabilities placed by our system of law upon men who are wholly blameless; but the list already given is long enough to demonstrate that even the most innocent and the most careful may incur civil, as distinguished from criminal, liabilities.

What, then, is meant by the persons who make the mistaken allegation that our law does not create a liability for a man who is not at fault? Doubtless they mean that our law does not create a liability for a person who is wholly outside the chain of causation. That may be true; but the employer with whom workmen's compensation acts have to do is not outside the chain of causation which results in the casualty. The employer has voluntarily participated in creating the relation of master and servant as to this business enterprise. Certain dangers, including negligence of the workman and of his fellow-servants, are inevitable as a business proposition. A man who plans a suspension bridge or a tunnel, for example, knows that experience tables tell in advance almost as well as after the fact how many lives must be lost. Both employer and employee by entering upon an enterprise in company assent for their own business purposes to the creation of a relation which will inevitably result in accidents and will thus cast burdens upon society. To say that either one of those two persons is outside the chain of causation is wholly inaccurate. Both parties are coöperating in the creation of the dangerous relation which results in the casualty. In a sense, then, there is no wholly innocent man in the transaction. The law — by judicial decision — used to place the preliminary burden upon one of them — upon the workman. The law — by the new statute — now places the preliminary burden upon the other.

And why not? Here is simply the shifting of a burden from one to the other of the two persons who have innocently, though selfishly, entered into the dangerous relation and have coöperated thus in causing the casualty.

The new statute, then, is not guilty of the novelty of placing a responsibility upon a person outside the chain of causation. In placing the responsibility upon one of the persons in the chain rather than upon the other, is the new statute outrageous? In the light of the compensation movement to which almost all the chief nations of the world have been parties, such an allegation is impossible.

Hence, even without insisting that the new statute tends to prevent poverty and to encourage the introduction of safety devices and to promote good will, ordinary legal reasoning proves that the shifting of the burden is constitutional; although, to be sure, these considerations just now named, based upon the police power, stand in the background ready to serve as reinforcements in case of need.

When one passes to the other essential element of the new statute, the mode of computing the amount of indemnity, one finds that the easiest course is to insist that this computation, even if it deprives the parties of the computations heretofore made by juries, is reasonable in itself and is a proper incident to be annexed to the privilege of engaging, either as employer or as workman, in enterprises involving the danger of burdening society. Obviously this is a direct appeal to the police power.

Thus familiar legal reasoning upholds the constitutionality of the statute.

The decisions, however, are as yet scanty and conflicting. In New York a workmen's compensation act has been overthrown. In Massachusetts one has been sustained. One has also been sustained in the state of Washington. These decisions — all of them in 1911 — deal with statutes of diverse forms.

In Ives *v.* South Buffalo Railway Co.[5] the New York Court of Appeals overthrew a statute[6] which became law June 25, 1910, and took effect September 1, 1910. This statute applied to only specified employments, described in it as especially dangerous. It

[5] 201 N. Y. 271, 94 N. E. 431 (1911).

[6] N. Y. Laws of 1910, c. 674.

provided that the employer should be liable to pay certain compensation in case persons engaged in manual or mechanical labor in those employments should suffer in the course of the employment a bodily injury by an accident arising out of the employment and in whole or in part caused by a necessary risk of the employment or by negligence of the employer or of any of his employees. There was an exception of injuries caused in whole or in part by "the serious and wilful misconduct" of the injured workman. The compensation was dependent upon wages; and in case of death account was taken of the nearness and number and degree of dependence of those who had been supported by the deceased. It was provided that not more than the actual damage should be recoverable, and also that there should be an election between the old remedies and the claim under the statute. It was agreed that the employments covered were really of an unusually hazardous nature and that thus there was not an arbitrary discrimination. The statute was overthrown under a provision of the state constitution,[7] similar to the Fourteenth Amendment, and worded thus: "No person shall be . . . deprived of life, liberty, or property, without due process of law." The decision was placed squarely upon the ground that "When our Constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another." [8]

This is in absolute conflict with the line of reasoning developed in the present article. However, the point was one of first impression. Besides, it should be noticed that perhaps the decision can be upheld upon a ground not taken by the court. The theory of workmen's compensation acts, it must be borne in mind, is that the pecuniary burden placed upon employers is merely preliminary and is to be shifted ultimately to consumers by increases in price. In so far as there are outstanding contracts for supplying goods and the like, there can be no shifting. It was probably unreasonable, therefore, to attempt to make the New York statute take effect in less than ten weeks. In Germany, Great Britain, and France there was a postponement of about one year, and in Austria of about two years. Conceivably the hardships incident to the promptness of the New York statute had some effect upon the court's view of the statute's reasonableness.

[7] Art. 1, sec. 6.

[8] Opinion of the court, *per* Werner, J., p. 293.

In The Opinion of the Justices,[9] the Supreme Judicial Court of Massachusetts assured the Senate of the constitutionality of an act[10] which was approved July 28, 1911, and which, as to its possibly burdensome features, takes effect July 1, 1912. This statute, applicable to all workmen except domestic servants and farm laborers, abolishes the defenses of contributory negligence and assumption of risk, — including the fellow-servant rule, — and gives for a casualty not due to the workman's own "serious and wilful misconduct" a compensation regulated by wages and by the degree to which persons are dependent upon the injured workman; but it leaves for the workman the option of recovering a common-law measure of damages, in case he gives notice upon entering the employment, and it offers to the employer the option of relieving himself from direct payment of the statutory compensation, in case he procures insurance in behalf of his workmen. The New York act offered to the employer no option. The Massachusetts act gives to the employer the option on the one hand to be directly liable for the casualties covered by the act, including casualties as to which the employer is blameless, and on the other hand to pay to an insurance company the premiums for assuming the same liability. Here is a distinction, to be sure, and the court naturally enough calls attention to the distinction, saying: "In this respect the act differs wholly so far as the employer is concerned from the New York statute."

Yet the distinction seems to be one without a difference. The New York statute gave to the employer a Hobson's choice, — either he must stay out of the business or he must assume the statutory liability. The Massachusetts statute gives one more option; but the new option is also burdensome. "Your money or your life," says the highwayman; and no one imagines that the choice offered causes the money to be a gift or the highwayman to be an honest man. So here, when the Massachusetts court upholds the statute it upholds the compulsion placed upon the employer to assume a burden for casualties of which he is morally innocent; and thus the Massachusetts decision is indistinguishably opposed to the one in New York.

In State *ex rel.* Davis-Smith Co. *v.* Clausen[11] the Supreme Court

[9] 209 Mass. 607, 96 N. E. — (1911).
[10] Mass. Laws, 1911, c. 751.
[11] 117 Pac. 1101 (1911).

of Washington upheld an act [12] of March 14, 1911,[13] whereunder for injuries to workmen in extra-hazardous occupations, regardless of questions of fault, — save instances in which the workman himself had "the deliberate intention" to produce the so-called casualty, — there shall be compensation, according to a schedule, from a state industrial insurance fund maintained by contributions from employers, the contributions being dependent upon wages paid and the seriousness of the hazard. The court expressed its approval, though unnecessarily, of the method whereby workmen's compensation acts measure the amount of indemnity. The important point, however, was the approval of the burden placed upon employers. As to this the court was emphatic, relying largely on the police power. The court expressly disapproved the New York decision, saying: "The act the court there had in review is dissimilar in many respects to the act before us, and is perhaps less easily defended on economic grounds. The principle embodied in the statutes is, however, the same; and it must be conceded that the case is direct authority against the position we have here taken."

In the Supreme Court of the United States there has been no decision exactly in point. There have been, to be sure, several decisions upholding the power of the state [14] and the federal [15] governments, within their respective spheres, to destroy the fellow-servant rule and the defense of contributory negligence, notwithstanding the due process provisions of the Fourteenth and the Fifth Amendments. Further, there appear to be no decisions upholding the conception that the creation of a civil liability requires someone to be morally at fault. On the contrary, there are decisions which give argumentative support to the propositions that our system of law is satisfied if the person held responsible is in the chain of causation, and that a person places himself in this chain whenever he voluntarily enters into an undertaking which, though lawful in itself and conducted carefully by him, results in damage to another. Thus, there has been a decision upholding the power of the states to compel railways, though not negligent, to

[12] Wash. Session Laws, 1911, c. 74.

[13] This act did not affect causes of action existing on or before September 30.

[14] Missouri Pacific Ry. Co. *v.* Mackey, 127 U. S. 205, 8 Sup. Ct. 1161 (1888); Tullis *v.* Lake Erie & Western R. Co., 175 U. S. 348, 20 Sup. Ct. 136 (1899).

[15] El Paso & Northeastern Ry. Co. *v.* Gutierrez, 215 U. S. 87, 30 Sup. Ct. 21 (1909).

pay for fires caused by their locomotives;[16] but this decision may be subject to the comment that an extraordinary liability has long been recognized as to a harborer of fire. There is also a very recent decision[17] that Congress can compel a carrier engaged in interstate commerce, and receiving merchandise for interstate transportation beyond its line, to pay for a loss to such merchandise even though the original carrier be free from negligence and the loss be caused by a later carrier on the specified route, and even though the bill of lading attempted to exclude this liability. As has been said, the decisions of the Supreme Court of the United States do not cover the very question as to workmen's compensation acts; but certainly they indicate with sufficient clearness this court's view that on the one hand due process of law does not require the perpetuation of old doctrines as to assumption of risk and contributory negligence, and that on the other hand due process of law includes, at any rate in civil cases as distinguished from criminal, no requirement of negligence or moral obliquity.[18] Nothing in the decisions of the Supreme Court of the United States appears to prevent legislative bodies from shifting the primary incidence of the financial burden of an employee's accident from the employee himself to the employer, — that is to say, from one to the other of the two persons who jointly enter upon the industrial undertaking and who thus participate in creating the situation out of which will come the casualty and the resultant loss to society.

The conclusion, then, is that, whether workmen's compensation acts are desirable or not, their essential features, both by reason and by the weight of decision, are constitutional. Apparently in large industrial enterprises the fellow-servant rule, assumption of risk, and contributory negligence are under sentence of death. That is a matter for the statesman and the legislator. To the mere lawyer it is clear enough that these old defenses are not rendered invulnerable and immortal by the Constitution of the United States.

Eugene Wambaugh.

HARVARD LAW SCHOOL, NOV. 10, 1911.

[16] St. Louis & San Francisco Ry. Co. *v.* Mathews, 165 U. S. 1, 17 Sup. Ct. 243 (1897).

[17] Atlantic Coast Line R. Co. *v.* Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164 (1911).

[18] Numerous state decisions to the same general effect are cited in State *ex rel.* Davis-Smith Co. *v.* Clausen, *supra*; but, like the decisions in the Supreme Court of the United States, they do not deal directly with workmen's compensation acts.